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In The

Supreme Court of the United States

ARTHUR CODAY, JR., A WASHINGTON STATE REGISTERED VOTER,

Petitioner,

v.

THE HONORABLE SAM REED, SECRETARY OF THE STATE OF WASHINGTON,

Respondent.

On Petition For Writ Of Certiorari To The Washington State Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the State of Washington violate the United States Constitution in its 2004 Governor's Election by granting a discretionary and definitive ballot recount, changing the election outcome, in exchange for the payment of $730,000?

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PETITION FOR WRIT OF CERTIORARI

Arthur Coday, Jr., respectfully prays and petitions that the Supreme Court of the United States will issue a writ of certiorari to review the judgment of the Washington State Supreme Court.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

The opinion of the Supreme Court of the State of Washington is published and reported at 156 Wash.2d 485, 130 P.3d 809 (March 9, 2006) and can be found in the appendix on pages 1-25. The order of the Supreme Court of the State of Washington denying a motion for reconsideration is dated May 31, 2006 and is scheduled for publication and can be found in the appendix on page 26.

JURISDICTIONAL AUTHORITY OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Washington State Supreme Court was signed by its justices on March 19, 2006 and can be found in the appendix on pages 1-25. A motion for reconsideration was timely filed with the Washington State Supreme Court, but on May 31, 2006 the Washington State Supreme Court Chief Justice signed an order denying the motion. A copy of this order can be found in the appendix on page 26.

Statutory jurisdiction of this Court with respect to this case is invoked under 28 U.S.C. § 1257(a). This statute gives the Supreme Court of the United States the authority to review the final judgment of the highest court in a state by writ of certiorari for, among other things, a

challenge to the constitutionality of a state law. Petitioner herein challenges the constitutionality of certain Washington State election laws.

The jurisdictional authority of this Court with respect to this case may also be defined by the Constitution of the United States of America. Article III, Section 1 of the Constitution says "the judicial Power of the United States, shall be vested in one supreme Court. . . ." Article III, Section 2 reads "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution . . . In all Cases . . . in which a State shall be a party, the supreme Court shall have original Jurisdiction." In this context, Petitioner believes the word "State" could mean both foreign and domestic states.

This case is a question of law and equity arising under the United States Constitution, and Washington State is a party to the case. Therefore Petitioner believes the Supreme Court of the United States has original jurisdiction.

By the authority cited above, Petitioner holds that the Supreme Court of the United States has full authority to review this petition, to issue a writ of certiorari, to hear the case, and to pass final judgment.

Because this case deals with an election in the State of Washington, the Honorable Sam Reed, Washington Secretary of State, is the Respondent. In the State of Washington, the Secretary of State is in charge of elections and therefore he is the appropriate Respondent on behalf of the State of Washington. Consistent with his role as Respondent, the Washington State Secretary has been represented in this matter by the Washington State Attorney General. Therefore, to the extent that this case will call into question the constitutionality of Washington State Law, the State of Washington has been appropriately included in all material aspects of this election challenge.

This includes the fact that Petitioner has served all relevant documents to the Washington State Attorney General via its counsel. Likewise, the Washington State Supreme Court sent copies of all relevant documents including its written opinion and order denying reconsideration to the Office of the Attorney General for Washington State and its special counsel. Because the State is a party, Supreme Court Rule 29.4(c) does not apply.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

The following portions of the Constitution of the United States of America are involved in the case:

1. Amendment I
2. Amendment XIV
3. Amendment XXIV

This case also involves the Washington State Constitution (Article I, Sections 1, 2, and 19) see pages 5-6, and portions of the Revised Code of Washington are also involved, including RCW 29A.64.011, 29A.64.021, 29A.64.030, 29A.64.070, 29A.64.081, and 29A.64.090 (Appendix pages 31-33).

STATEMENT OF THE CASE

1. Historical Record

Washington State held a general election that included both federal and state ballot measures on November 2, 2004. Three candidates for the Office of Governor were on the ballot including Dino Rossi, Republican;

Christine Gregoire, Democrat; and Ruth Bennett, Libertarian.[1]

Approximately 2.8 million ballots were cast in this election. The ballots were counted by machine as specified in Washington State Law and the result was that Dino Rossi placed first by a margin of 261 votes over the second-place candidate, Christine Gregoire. Candidate Ruth Bennett was a distant third place. Because the margin of victory separating the top two candidates was within a certain statutorily prescribed range, a mandatory second counting of the ballots by machine took place. The result of the second counting showed that once again Rossi and Gregoire placed first and second, respectively, but only 42 votes separated them. Secretary of State Sam Reed certified the result.[2]

On December 3, 2006 a representative of the Democratic Central Committee of Washington paid the State of Washington $730,000 and applied for a statewide manual recount. In response, the Secretary of State ordered a statewide manual recount on December 6, 2006, and on December 8, 2006 the recount began.[3]

In the interim, a total of 735 uncounted ballots were discovered by election workers in King County,[4] a County which is generally considered to be a stronghold for the Democratic Party. The Republican Party filed suit in Pierce County Superior Court to prevent the newly discovered ballots from being included in the hand recount. The Democratic Central Committee was allowed to intervene in this suit but the Republicans prevailed. The Democratic

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[1] 156 Wash.2d 485, 488, 130 P.3d 809, 810.

[2] 156 Wash.2d 485, 488-489, 130 P.3d 809, 810.

[3] 156 Wash.2d 485, 489, 130 P.3d 809, 811.

[4] 156 Wash.2d 485, 489, 130 P.3d 809, 811.

Central Committee appealed to the Washington State Supreme Court which reversed the lower court ruling and thus required that the newly discovered ballots should be counted.[5] However, there were 168 ballots, legally cast, that did not get counted in the third and final count.[6]

The manual recount was completed on December 23, 2004 and attributed 1,373,361 votes to Gregoire, 1,373,232 votes to Rossi, and 63,456 votes to Bennett. By a margin of victory of 129 votes, Gregoire won the election based on the manual recount. Secretary of State Reed transmitted the election results to the State Legislature on December 30, 2004, and on January 11, 2005 the Legislature certified Gregoire as the winner. She took oath for the Office of Governor on January 12, 2005.[7]

Ultimately, the State returned the $730,000 to the Democratic Party along with 2% interest on the principle.[8]

2. Relevant Washington State Constitutional and Statutory Provisions

The State of Washington has constitutional and statutory provisions that are most relevant to understanding the historical record explained above and proceedings in the Washington State Supreme Court which will be detailed below.

Relevant portions of the Washington State Constitution include:

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[5] *Washington State Republican Party v. King County*, 153 Wash.2d 220, 224, 103 P.3d 725 (2004) as referenced in 156 Wash.2d 485, 489-490, 130 P.3d 809, 811.

[6] Chelan Superior Court Case No. 05-2-00027-3, oral opinion rendered by Judge John E. Bridges on June 6, 2005.

[7] 156 Wash.2d 485, 490, 130 P.3d 809, 811.

[8] 156 Wash.2d 485, 491, 130 P.3d 809, 811.

ARTICLE I SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

ARTICLE I SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

ARTICLE I SECTION 19 FREEDOM OF ELECTIONS. All Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

Please see appendix for relevant statutory provisions.

3. Proceedings Below

Petitioner timely filed a contest to the election in the Washington State Supreme Court on December 29, 2004. In doing so, Petitioner exercised his Washington State constitutional[9] and Washington State statutory[10] rights to contest an election. In his brief, Petitioner charged that the election violated the concept that all elections should be equal and free. Petitioner argued that fundamental and significant inequality resulted by the State of Washington accepting the payment of private money in exchange for granting a ballot recount to the Democrats. In summary, Petitioner maintained that because the State allowed the Democrats a degree of influence on the election not shared equally among the voters, the act was intrinsically unequal.

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[9] "The supreme court shall have original jurisdiction in habeas corpus, and quo warranto and mandamus as to all state officers . . . " Washington State Constitution, Article IV, Section 4.

[10] RCW 29A.68.

That is, no other private interest in the State would have been allowed to subsequently call for another recount hoping to once again change the outcome of the election. Petitioner also argued that the principle that elections should be free was also compromised by the exchange of money. Petitioner rightly asserted that the Washington State Constitution had been violated, because it requires all elections to be "free and equal."[11]

Petitioner's original brief filed December 29, 2004 quoted Amendment XIV(2) of the United States Constitution and noted:

> This passage from the United States Constitution suggests that the various States in the Union have a duty to promote full and equal representation of the eligible voting public in any and all elections. While it may not be logistically possible for any State to conduct an election that perfectly represents the voters, certainly any State laws or election practices that officially promulgate and sanction unequal voter representation must be viewed as questionable.[12]

While the above quotation was made in reference to the fact that using different sets of ballots to count different statewide ballot items would promote inequality among voters, Petitioner clearly asserted that states have a duty under the United States Constitution to promote equal representation of voters and that all election practices should promote voter equality.

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[11] Washington State Constitution, Article I, Section 19.

[12] Procedures Used in the 2004 Election for the Office of Governor in Washington State Violate Washington State's Constitution. A brief submitted to the Washington State Supreme Court on December 29, 2004 by Arthur Coday, Jr., a Washington State citizen, taxpayer, and registered voter. P.9.

Having established in the original brief that equality in elections was required by the United States Constitution, Petitioner filed Addendum I to his contest of election in the Washington State Supreme Court on July 11, 2005.[13] In this document Petitioner argued that the requirement of Washington State to pay $730,000 in order to secure a recount was a practice that promoted inequality among voters. Due to the unequal distribution of capital among Washington's voters there would necessarily be unequal access to such recounts.

The Washington State Supreme Court by letter of June 24, 2005 gave permission to the Secretary of State and the Washington State Democratic Central Committee, upon their request, to make comments on how the election contest filed by this petitioner and those filed independently by three other petitioners (Daniel P. Stevens, Suzanne D. Karr, and Michael J. Goodall; these petitioners are listed as parties herein) should be addressed. The court granted the request and allowed comments to be served and filed by July 12, 2005. Subsequently, comments were filed on behalf of the Secretary of State by the Office of the Attorney General and its special counsel, and by attorneys representing the Washington State Democratic Central Committee. In their comments, the counsel for the Office of the Attorney General and the counsel for the Democrats recommended that the four election contests be dismissed by the Washington State Supreme Court.

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[13] Addendum I. Re: Supreme Court Docket Number 76480-8 – in the matter of the election contest filed by Arthur Coday, Jr. Submitted to the Washington State Supreme Court July 11, 2005 by Arthur Coday, Jr.

Petitioner filed Addendum II to his election contest in the Washington State Supreme Court on July 14, 2005.[14] Addendum II was primarily a written rebuttal to the portion of the above comments made about his contest of election. It made reference to the fact that the media reported that most of the money used to procure the recount by the Democrats actually came from sources outside the State of Washington. Indeed, it was reported that "$250,000 (came) from former presidential candidate John Kerry; $250,000 from the National Democratic Committee; $250,000 from MoveOn PAC; and more than $200,000 from online donations spurred largely by a national appeal from former presidential candidate Howard Dean."[15]

On March 9, 2006 the Supreme Court of the State of Washington issued a written opinion dismissing all four election contests, including Petitioner's. Petitioner can find no reference to the United States Constitution in the portion of the opinion that addresses his contest of election.[16] Furthermore, the opinion suggested that the Washington State Supreme Court found nothing to suggest material voter inequality in the election as claimed by Petitioner.

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[14] Addendum II. Re: Supreme Court Docket Number 76480-8 – in the matter of the election contest filed by Arthur Coday, Jr. Submitted to the Washington State Supreme Court (July) 14, 2005 by Arthur Coday, Jr.

[15] McGann Chris. *Democrats call for statewide recount; Election drama continues; and Halley set to start next week.* Seattle Post-Intelligencer. December 4, 2004.

[16] The Washington State Supreme Court issued one written opinion that addressed all four of the election contests before it, including Petitioner's.

Pursuant to RAP Rule 12.4 Petitioner timely filed a Motion for Reconsideration of Decision Terminating Review in the Supreme Court of the State of Washington on March 29, 2006. In this document, Petitioner again alleged that the election violated the Constitution of the United States. Specifically, Petitioner maintained:

> ... that my right and the right of more than 51% of Washington's voters to a free and equal election, free from interference ... has been violated, as has my (our) rights under the United States Constitution in respect to the implied right to vote in state elections found in Amendment I,[17] the right to equal protection under the law and equality in elections, explicated and implicated, respectively, by the Equal Protection Clause in Amendment XIV (1.), the right to vote for State Officers in Amendment XIV (2.), and the implied right to elections free of poll taxes and any other related election fees as contemplated by Amendment XXIV.[18]

As noted, Petitioner's motion for reconsideration was denied by the Washington State Supreme Court on May 31, 2006 (see Appendix page 26). No written opinion was issued by that court as to why the motion was denied.

Suzanne D. Karr, a party herein, also filed a motion for reconsideration on March 29, 2006 and similarly the motion was denied without explanation on May 31, 2006.

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[17] In the Supreme Court of the United States. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663-670 (1966).

[18] In the Supreme Court of the State of Washington. In the Matter of The Election Contest Filed by Arthur Coday, Jr., Petitioner v. Sam Reed, Secretary of the State of Washington, Respondent. Supreme Court Number 76480-8. Motion for Reconsideration of Decision Terminating Review. March 29, 2006.

ARGUMENT

1. Analysis of Washington State Ballot Recount Laws and the Discretionary and Definitive Manual Recount in the 2004 Washington State Governor's Election

A. Washington State's Ballot Recount Laws

Washington State Law provides for both mandatory and discretionary ballot recounts.

RCW 29A.64.021 and RCW 29A.64.090 provide for mandatory ballot recounts at the expense of the State. Specifically, it provides for a mandatory ballot recount whenever the initial ballot count shows the difference in the number of votes cast for the two candidates for any office to be less than 2,000 votes and also less than 0.5% of the total number of votes cast for those two candidates. In this case, the first counting of ballots, done by machine, showed that Dino Rossi had 261 more votes than Gregoire, with approximately 2.75 million votes having been cast collectively for these two candidates.[19] Therefore, per the statute, a mandatory machine recount was ordered by the Secretary of State. This count was done by machine, just like the first.[20] As noted above, Rossi won the second count by 42 votes and the result was certified by the Secretary of State.[21]

Washington State Law also provides for what Petitioner refers to as discretionary and definitive ballot recounts. They are discretionary in the sense that they are not mandated by the State or by law in any particular instance. Rather, they occur if and when eligible parties

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[19] 156 Wash.2d 485, 488-489, 130 P.3d 809, 810.

[20] 156 Wash.2d 485, 488-489, 130 P.3d 809, 810.

[21] 156 Wash.2d 485, 489, 130 P.3d 809, 810.

request them and make an appropriate payment of money to the State. They are definitive in the sense that their result is the exclusive determinant of the election outcome.

RCW 29A.64.011 defines what parties are eligible under State Law to request a ballot recount. It allows for "an officer of a political party or any person for whom votes were cast at any election," and it also allows "any group of five or more registered voters" to file a written application for a recount. Per the statute, the recount application must specify whether the ballots will be counted by "the vote tally system" (machine) or "manually" (by hand).

Washington State Law provides that when an eligible party applies for a manual recount, it must deposit with the county canvassing board or the Secretary of State an amount equal to $.25 for each ballot cast in the jurisdiction or portion of the jurisdiction for which the recount was requested. For a machine recount, the deposit would be $.15 per ballot.[22] If the party requesting the recount prevails, the entire deposit is returned, as in this case. If the party requesting the recount does not prevail, then the cost of the recount will be deducted from the deposit, and the balance then returned to the applicant. If the cost of the recount exceeds the amount of the deposit, the applicant shall pay the difference.[23]

Presumably, in order to promote closure, Washington State Law limits the total number of ballot counts in any election to three. RCW 29A.64.070 says that "After the original count, canvas, and certification of results, the

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[22] RCW 29A.64.030.

[23] RCW 29A.64.081.

votes cast in any single precinct may not be recounted and the results recertified more than twice."

Printed directly under RCW 29A.64.070 was a note:

> **Finding, purpose**-1991 c 90: "The legislature finds that it is in the public interest to determine the winner of close contests for elective offices as expeditiously and as accurately as possible. It is the purpose of this act to provide procedures which promote the prompt and accurate recounting of votes for elective offices and which provide closure to the recount process." [1991 c 90 § 1.]

B. The Discretionary and Definitive Manual Recount in the 2004 Washington State Governor's Election

Petitioner maintains that the manual recount promoted voter inequality and diminished the value of votes cast for candidates other than Gregoire. Petitioner also maintains that it is on the public record that the discretionary and definitive manual recount changed the outcome of the election. Therefore, a prima facie case exists demonstrating that the alleged voter inequality was not simply an abstract concept. Rather, it was the basis for determining who would be Governor.

The primary basis for the inequality posed by the discretionary and definitive manual recount is the fact that the Democrats were afforded a level of influence on the election proper, as opposed to the campaign, which was not equally shared by Washington's general voting public. Specifically, no other interest in the State was allowed to call for an additional counting of ballots in which the outcome would be definitive and conclusive. Furthermore, no other interest in the State had the discretion of selecting the method of ballot counting used in the definitive

recount. To many observers, including Petitioner, it appeared that the Democrats simply bought decisive election influence with a sum of money beyond the means of most voters, including Petitioner.

If Washington State Election Laws resulted in perfect equality, any one voter would be allowed to call for a discretionary and definitive recount in any given election, free from financial barriers. That would mean that in this particular case, there could be a fourth counting of the ballots, followed by a fifth, followed by a sixth, etc. One can easily imagine, in an election this close, in which three counts of the ballots yielded three different vote tallies and two different outcomes, it is entirely possible that a fourth counting of the ballots would yield yet a different ballot total and show that Rossi had the most votes. However, voters who supported Rossi will not be given that opportunity in this election because the State limits the total number of ballot counts to three.

This concept was stated clearly to the Washington State Supreme Court:

> . . . on retrospective analysis the election was materially unequal. That is, in the final analysis candidate Gregoire and the voters who supported her were shown special favor by the state at the expense of candidate Rossi and the voters who supported him. Specifically, only candidate Gregoire was allowed the opportunity to pay for a definitive recount by a method of her own choosing. The state has not given Dino Rossi or his supporters the same opportunity. This is a major point because should there be another recount of the ballots by a method of Rossi's choosing it is possible that Rossi would prevail given the closeness

> of the election and the fact that in both machine counts he won.[24]

Petitioner also maintains the cost associated with initiating a discretionary ballot recount is prohibitive for most Washington voters. As stated to the Washington State Supreme Court:

> The fact that the sum of money required by the state was considerably larger than the vast majority of Washington state voters could afford to pay is obvious proof that the state erected a discriminatory barrier against the vast majority of its voters, denying the average voter equal access to this election favor. Clearly, wealthier voters and well funded special interest groups had substantially greater opportunity to influence the election process than counterparts with less financial capital. Not only was the recount not free, but due to the relatively high cost it was profoundly unequal as financial capital is unequally distributed amongst Washington's roughly 2,812,675 voters.[25]

In this particular case, it could be argued that the requirement to pay money to the State at the time of application for a recount actually harmed the Democrats and therefore should be of no concern to Petitioner. However, this does not take into account the possibility that

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[24] Procedures Used in the 2004 Election for the Office of Governor in Washington State Violate Washington State's Constitution: A brief submitted to the Washington State Supreme Court on December 29, 2004 by Arthur Coday, Jr., a Washington State citizen, taxpayer, and registered voter. Addendum I, p. 5. July 11, 2005.

[25] Procedures Used in the 2004 Election for the Office of Governor in Washington State Violate Washington State's Constitution: A brief submitted to the Washington State Supreme Court on December 29, 2004 by Arthur Coday, Jr., a Washington State citizen, taxpayer, and registered voter. Addendum I, p. 2. July 11, 2005.

had there been no cost associated with obtaining a recount, individual Rossi supporters may have ordered a recount and chosen the "vote tally system" (machines) as the third and final count as a tactical maneuver simply to prevent the possibility of a manual recount. This is not a small point because there was a great deal of suspicion within the State that there was election corruption, particularly within King County, and some feared that a manual recount would be more vulnerable to impropriety than would be a machine recount. Furthermore, many voters probably believe that a machine count is more accurate than a manual count. Finally, as Rossi had won with the two prior machine counts, it stands to reason that machine counting would probably have been the method of choice for many Rossi supporters, including Petitioner, had they been given a voice in the matter.

Unfortunately, this election not only resulted in a decisive inequality amongst Washington voters, but it also resulted in a general diminution in the value of a vote in Washington State. As described, the Democratic Party was allowed to influence the election itself. Influence on an election should be restricted to voters only; and the level of influence afforded each voter should be exactly one vote. In this election, a nonvoting entity, a political party, was allowed to pay money to the State in order to secure influence – decisive influence – upon the election. Even more worrisome, because Washington State Law does not appear to specify from what source the money comes, it allows for the possibility that money comes from out-of-state. The idea that any out-of-state interest can even have the possibility of decisively influencing a Washington State election is troubling and undermines not only the individual voters of Washington but, indeed, the sovereignty of Washington as a self-governing State. The seriousness of this point cannot be overstated. After all,

the federal government has seen fit to regulate even campaign finance. Clearly, in this case, the issue is not campaign finance per se; the primary issue is influencing an election proper with money, a far more serious matter.

In this election, the roughly 51% of Washington voters who did not vote for Gregoire sustained diminution in the value of their vote, and to the extent this happened, their right to freedom of expression through political means has been unconstitutionally limited (Amendment I violation) and their constitutional right to equality has been wrongfully compromised (Amendment XIV (1)).

2. Review of United States Supreme Court Election Cases and Principles With Application to This Case

Petitioner brings this case before The Supreme Court of the United States in large measure because of the importance of elections. In its opinion in *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964) the Court noted that

> "the right of suffrage is a fundamental matter [377 U.S. 533, 562] in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights. Almost a century ago, in *Yick Wo v. Hopkins* (italics added), 118 U.S. 356, the Court referred to "the political franchise of voting" as "a fundamental political right, because preservative of all rights." 118 U.S., at 370." 377 U.S. 533, 562 (1964).

The Court said in its opinion for *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) "No right is more precious in a free country than that of having a voice in the election of those

who make the laws under which, as good citizens, we must live."[26] Also in *Reynolds v. Sims*, 377 U.S. 533, 555 (1964), the Court said "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of a representative government." In another case, the Court said "it is beyond cavil that "voting is of the most fundamental significance under our constitutional structure." *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).[27]

The Court has ruled in numerous election cases over the years. In the election case of *McPherson v. Blacker*, 146 U.S. 1, 23 (1892), the Court said

> But the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such Constitution and laws . . .

This opinion showed that the Court recognized its jurisdiction over election cases within states when state election laws were asserted to be in violation of the United States Constitution or laws. In *Gray v. Sanders*, 372 U.S. 368, 381 (1963), the Court reiterated this principle: "'When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when the state power is used as an instrument for circumventing a federally protected right.'"[28] These rulings reinforce the validity and appropriateness of the United States Supreme

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[26] *Burdick v. Takushi*, 504 U.S. 428, 441 (1992).

[27] *Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

[28] *Gomillion v. Lightfoot*, 364 U.S. 339, 347.

Court reviewing this Petitioner's case given that Petitioner maintains Washington State election practices and laws violate the United States Constitution.

Petitioner also maintains that the requirement to make relatively large payments of money to the State of Washington in order to obtain a discretionary and definitive ballot recount is a violation of Amendments I and XIV to the United States Constitution. The actual right to vote in-state elections is implied by the Constitution, particularly Amendment I, and this right "may not constitutionally be conditioned upon the payment of a tax or fee. Cf. *Murdock v. Pennsylvania* (italics added), 319 U.S. 105, 113 [1943]." This quote appeared in the opinion for *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665 (1966). Apparently, this was a case involving the imposition of a $1.50 poll tax on Virginia voters in about the 1960s, and the Court ruled that such a poll tax was unconstitutional. In its opinion, the Court further argued that "We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 666 (1966).

From Petitioner's perspective as a registered voter, Washington State should not affix any form of payment as a precondition for accessing a voting right. If discretionary and definitive ballot recounts are allowed by this Court to continue into the future, they should be free in order to assure equal access to the right. However, as argued above, Petitioner considers discretionary and definitive recounts to be unconstitutional even if they are free. This is because they necessarily promote inappropriate and unequal influence in elections, as discussed above. This

inequality in turn represents a violation of Amendment XIV (1), the Equal Protection Clause.

Generally citing the Equal Protection Clause, this Court in numerous cases involving elections has consistently ruled that equality among voters is a constitutional mandate. In *Gray v. Sanders*, 372 U.S. 368, 381, the Court said " . . . we see no constitutional way by which the equality of voting power may be evaded . . . The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote."

This Court concluded " . . . that the equal protection clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment . . . " *Reynolds v. Sims*, 377 U.S. 533, 566 (1964). While Petitioner is not claiming that the weight of his vote has been diluted by place of residence, he does maintain that the weight of his vote has nevertheless been diluted by allowing select others in his State the opportunity to stage a ballot recount that could only harm, not benefit, the chance of victory of the candidate for whom he voted. More generally, in *Reynolds v. Sims*, 377 U.S. 533, 565 (1964), the Court said "full and effective participation by all citizens in-state government requires, therefore, that each citizen have an equally effective voice in the election . . . Modern and viable state government needs, and the Constitution demands, no less."

The Court ruled in *Hadley v. Junior College District*, 397 U.S. 50, 56 (1970), " . . . that as a general rule, whenever a State or local government decides to select persons by popular election to perform governmental functions, the

Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election.... In that same opinion, pages 52-53, the court said "In an elaborate opinion in Reynolds we called attention to prior cases indicating that a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased, or diluted. *Ex parte Siebold*, 100 U.S. 371 (1880); *Ex parte Yarbrough*, 110 U.S. 651 (1884); *United States v. Mosley*, 238 U.S. 383 (1915); *Guinn v. United States*, [397 U.S. 50, 53] 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *United States v. Classic*, 313 U.S. 299 (1941). On page 53 of the *Hadley* opinion, the Court also noted that " . . . a qualified voter in a local election also has a constitutional right to have his vote counted with substantially the same weight as that of any other voter in a case where the elected officials exercised 'general governmental powers over the entire geographic areas served by the body.'"[29] Once again, in a very general way, the Court has ruled that in elections for state officials there must be equality among voters. This is a constitutional requirement.

The Court's commitment to equality among voters is shown yet again in the case of *Wells v. Edwards*, 409 U.S. 1095, 1097 (1973). Quoting from *Gray v. Sanders*, 372 U.S. 368, 379-380, 83 S.Ct. 801, the Court stated "The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his state . . . underlies many of our decisions."

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[29] *Avery v. Midland County*, 390 U.S. 474 (1968).

The Court showed that equality in elections includes more than just casting a ballot in an equal manner. It also includes equality in the processing of ballots. This was stated in *Bush et al. v. Gore et al.*, 531 U.S. 98, 104-105 (2000) in which the Court said "the right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's over that of another." In Washington State, it would appear that voters casting ballots for Gregoire had disparate and favorable treatment relative to all other voters. Indeed, there was also an element of arbitrariness about the situation because the State has no way of knowing in any given election whether or not private interests will initiate a discretionary definitive recount. This introduces an element of arbitrariness to the process to which the voting masses are subjected. Also in *Bush et al. v. Gore et al.*, 531 U.S. 98, 105 (2000), the Court notes that "the right of suffrage can be denied by a debasement of dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964)."

It may be that the inequality promulgated on voters by discretionary and definitive ballot recounts is a slightly more subtle form of inequality than a poll tax. However, it is no less invidious and its subtlety should not distract from its ability to compromise the Constitution. In *Reynolds v. Sims*, 377 U.S. 533, 563 (1964), the Court noted that "One must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination.' *Lane v. Wilson*, 307 U.S. 268, 275; *Gomillion v. Lightfoot*, 364 U.S. 339, 342."

Although the United States Supreme Court has consistently championed the constitutional rights of voters, it nonetheless has recognized that states must necessarily enact laws and regulations in order to conduct orderly elections. *Storer v. Brown*, 415 U.S. 724, 730 (1974). In determining whether state election laws are valid in the context of a challenge to their constitutionality, the Court has established criteria which it published in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983). Suggesting that there is no "litmus-paper test," the following guidelines were put forth:

> Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interest put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional. See *Williams v. Rhodes*, supra, at 30-31; *Bullock v. Carter*, 405 U.S. at 142-143; *American Party of Texas v. White*, in 415 U.S. 767, 780-781 (1974); *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 183 (1979).

The question, then, is this: Does the allowance of discretionary and definitive ballot recounts accomplish "the precise interest put forward by the State," and do these interests "make it necessary to burden the plaintiff's rights?" In this case, the answer to both questions clearly is "no."

As stated above, the Washington State Legislature indicates that "it is in the public interest to determine the winner of close contests for elective offices as expeditiously and as accurately as possible . . . and . . . provide closure to the recount process."[30] Obviously, the goal of settling the contest expeditiously was actually compromised by adding an additional ballot count. In this case, the discretionary and definitive hand recount prolonged the interval between the casting of ballots and the determination of the election winner.

With respect to increasing the accuracy of the count, Petitioner is aware of no evidence that a hand count is more accurate than a machine count. If the State had a protocol where it averaged all ballot counts, then in theory increasing the number of counts would actually increase the accuracy. However, the State of Washington does not make use of this generally accepted statistical principle in processing elections. It simply uses the result of the final count to determine the outcome.

With regard to the goal of providing closure, there would have been no advantage to adding additional counts of the ballots. In a situation in which additional counts do not improve accuracy but instead only delay determination of the winner, the goal of closure is also compromised.

Finally, it must be noted that in this particular case, the State ultimately paid for the recount even though neither it nor its voters obtained any value from the exercise.

Using the criteria established by the Court in *Anderson v. Celebrezze*, 460 U.S. 780, there is no compelling State interest that can justify the compromise of voter

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[30] Printed directly under RCW 29A.64.070 was a note: Finding, purpose-1991 c 90: [1991 c 90 § 1.]

equality that results from discretionary and definitive ballot recounts as practiced in Washington. Therefore, Washington's discretionary and definitive ballot recounts and the laws that provide for them are unconstitutional in the light of Amendments I and XIV(1). Therefore, the 2004 Governor's Election discretionary and definitive recount was also unconstitutional.

3. Assertions

Petitioner asserts that Washington State violated the United States Constitution in the 2004 election of Governor. Specifically, its allowance of a discretionary and definitive recount to the Democrats in exchange for the payment of money resulted in unequal voter representation and changed the outcome of the election. Similarly, the laws that allowed this to occur are also unconstitutional.

The particular provisions of the United States Constitution that were violated are listed below.

A. Amendment I Was Violated

As argued above, this amendment has been understood by the Court to grant an implied right to vote for state officers. Washington State discretionary and definitive recounts require the payment of money, which produces inequality, and apart from this financial barrier give some voters relatively more influence than others, also promoting inequality. This is antagonistic to the implied right to vote as conceived by this Court and contemplated by the Constitution.

B. Amendment XIV(1) Was Violated

As argued above, this amendment, by virtue of the Equal Protection Clause, has been understood by the Court to confer equality among voters in all of the states.

Among other things, this applies to the right of voters to have equal influence in elections of state officers, and this would of course include Governor. Washington State discretionary and definitive recounts require the payment of money, which produces inequality, and apart from this financial barrier give some voters relatively more influence than others, also promoting inequality. This is antagonistic to Amendment XIV(1) as conceived by this Court and contemplated by the Constitution.

C. Amendment XIV(2) Was Violated By Implication And Its Punitive Provision May Be Applicable

As argued above, in the 2004 Washington State Governor's election approximately 51% of Washington State voters had the relative weight of their votes diminished by the unconstitutional discretionary and definitive manual recount. Amendment XIV(2) says that "when the right to vote at any election for the choice of . . . the Executive and Judicial officers of a State . . . is denied . . . or in any way abridged . . . the basis of representation therein shall be reduced in proportion. . . ." That is, having abridged the right to vote for over half of its voters, Washington State is at risk of losing over half of its representation in the United States House of Representatives. By its nature, this amendment implies a right to vote for state officers and to this extent was itself violated.

D. Amendment XXIV Is Violated by Implication

To the extent that Washington State Election Law would permit discretionary and definitive recounts to occur in exchange for payment with respect to the election of federal officers or electors this amendment would, by implication, be violated. Conceptually, the arrangement in which a voter

pays the state for a discretionary recount is really no different than the arrangement in which a voter pays the state to obtain a ballot. Either way, the voter pays the state to gain influence in the election. As argued above, this Court has understood the payment of fees and taxes associated with election influence and voting to be unconstitutional.

4. Reasons for Granting the Petition For a Writ of Certiorari

A. Constitutional Violations

This case represents important violations of the United States Constitution. For such matters, the Supreme Court of the United States has supreme and final authority. Clarification by this Court regarding the constitutional issues would be valuable for Washington State, its voters, as well as other states and their voters.

B. Importance of Elections

As recognized by this Court, elections are of vital importance to the states and the nation. The right to vote in the setting of equality is a most fundamental right preservative of all other rights in a free and democratic society. The Supreme Court of the United States plays a unique and instrumental role in preserving voter rights in cases where states have violated those rights. In this particular case, the election in question involves the highest ranking state officer.

C. Some of the Election Laws and Practices of Washington State Are Contrary to Principles Established in Multiple United States Supreme Court Cases

It would appear that with respect to discretionary and definitive ballot recounts, the State of Washington has

laws and practices which are contrary to principles established by this Court. It would be of general importance for the Court to correct such discrepancies and clarify any necessary issues. This would not only be for the benefit of Washington State and its voters, but also for the benefit of other states and their voters.

D. The Washington State Supreme Court Made an Error

The Washington State Supreme Court has denied Petitioner and the majority of Washington voters their right to equality in elections as defined under both the Washington State Constitution and the United States Constitution. Petitioner, lacking the financial resources to hire an attorney, made his very best effort in good faith to show the Washington State Supreme Court the state and federal constitutional problem of voter inequality posed by this election. Of the four documents sent to that court by Petitioner, every one asserted that equality had been compromised in the election. To the best of Petitioner's limited resources, knowledge, and ability as an ordinary voter, he raised all appropriate state and federal constitutional issues clearly and timely and in the proper jurisdictional venues. To date, Petitioner and other Washington voters have simply been denied their constitutional rights, and judicial options in the State have been exhausted. Petitioner begs merciful consideration and allowance from this Court in light of his standing as an ordinary voter of ordinary means, representative of the voting masses in Washington.

Petitioner hopes and prays the Court will avoid a situation in which individual states and their courts can independently define equality in elections in a way that runs contrary to the United States Constitution and its interpretation and application by the Supreme Court of

the United States. Petitioner fears that the Legislative, Judicial, and Executive branches of the Washington State Government have promulgated a false measure of equality among Washington state voters that is in conflict with the United States Constitution.

E. If Not Corrected Now, the Problem Has the Potential to Recur and Escape Judicial Review

This Court held in *Norman v. Reed*, 502 U.S. 279, 280 (1992), that "The controversy is not moot, even though the 1990 election is over, both because it is 'capable of repetition yet evading review,' and because the results of that election will entitle the HWP to enter the next election as an established party. . . ." In the present case, Petitioner has exhausted in-state judicial review. If this Court does not grant a writ of certiorari for this present case, why would it do so for any future case regarding discretionary and definitive ballot recounts? Furthermore, Gregoire is not yet halfway into her term as Governor. As she was not duly elected from a constitutional perspective, this Court could still preserve the balance of the term by properly ordering her removal from office.

F. Out-Of-State Interests Should Not Be Allowed the Opportunity to Influence Washington State Elections

As mentioned above, the media reported that most of the money used for obtaining the discretionary and definitive ballot recount came from outside of Washington State. Petitioner has no way to verify the media reports. However, it is true that because a large sum of money is required by the State to grant a recount, the future possibility exists that out-of-state interests could influence Washington State elections simply by sending money to obtain ballot recounts. Washington State Law must be changed to prevent this from

happening. If the Washington Legislature and Supreme Court are unwilling to close this loophole, perhaps the United States Supreme Court will. Clearly the Constitution of the United States as well as the individual state constitutions contemplate that only voters registered within a given state shall be able to vote and otherwise directly influence and participate in the election within that state. Constitutional principles imply that political parties and other organizations should not have the right to vote or any derivative power thereof, such as calling for a recount. Political parties and other organizations, while participating in elections by fielding candidates and promoting their campaigns, do not share with voters the power to vote. The power to vote belongs exclusively to the registered voters in a state and must be shared equally among them, and it must be immune from outside interference. Therefore, to the extent that this Court sees this case as representing a real or potential conflict between states or between a state and persons residing in another state or between persons residing in different states, Article III, Section 2 of the Constitution places this case under the judicial power and authority of the United States and the Supreme Court.

For the above reasons, Petitioner maintains that the Supreme Court of the United States should review and rule on this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully and humbly submitted on August 29, 2006 by

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IN THE SUPREME COURT OF THE STATE OFWASHINGTON

In the Matter of the Election Contest Filed by ARTHUR CODAY, JR., Petitioner.	No. 76480-8
In the Matter of the Election Contest Filed by MICHAEL J. GOODALL, Petitioner.	No. 76541-3
In the Matter of the Election Contest Filed by SUZANNE D. KARR, Petitioner.	No. 76500-6
In the Matter of the Election Contest Filed by DANIEL P. STEVENS, Petitioner.	No. 76479-4

Filed MAR 09 2006

ALEXANDER, C.J. – Four election contests challenging the results of the 2004 governor's election were filed in this court by individual electors. These contestants rely on various grounds to challenge the results of the election. We conclude that three of these contests, those filed by Arthur Coday, Jr., Michael J. Goodall, and Daniel P. Stevens, fail to state a cognizable claim under the election contest statute. The fourth of these contests, that filed by Suzanne D. Karr, is identical to *Borders v. King County*, No. 05-2-00027-3 (Chelan County Super. Ct. June 24, 2005), which was decided in Chelan County Superior Court, and is, therefore, barred under the doctrine of res judicata. We, therefore, dismiss all four contests.

I.

The events surrounding the 2004 race for governor in Washington State are by now well known. Nevertheless, a brief summary of these events is appropriate. The general election was held November 2, 2004. Vying for the governor's office were Democrat Christine Gregoire, Republican Dino Rossi, and Libertarian Ruth Bennett.

The results of the initial count of ballots, certified November 17, indicated that Rossi had received 261 more votes than Gregoire. *See* Court's Oral Decision, *Borders v. King County,* No. 05-2-00027-3 (*Borders* Oral Decision) at 4. Due to the narrow margin of votes separating the candidates, a mandatory recount was automatically triggered. A machine recount was ordered by the secretary of state on November 17 and commenced shortly thereafter. The results of the machine recount were reported November 30 and indicated that Rossi had received 42 more votes than Gregoire. On that date the secretary of state certified that result.

On December 3, a representative of the Democratic Party applied for a statewide manual recount, *id.* at 5, and, as required by statute,[1] deposited $730,000 to cover the costs thereof should the outcome of the election not change as a result of the recount. On December 6, the secretary of state ordered a statewide manual recount. The manual recount began on December 8.

Also on December 3, the Democratic Party filed an original action in this court. The Democrats sought to have thousands of ballots, which were rejected in the initial

[1] *See* former RCW 29A.64.030 (2003).

count because of certain defects, "recanvassed" during the hand recount. We rejected the Democrats' request to order the recanvass of previously rejected ballots, reasoning that Washington law requires a recount of only those ballots actually tabulated in the initial count. *See McDonald v. Reed,* 153 Wn.2d 201, 103 P.3d 722 (2004).

Meanwhile, 573 previously uncounted ballots were discovered in King County by election workers (eventually, another 162 such ballots were discovered, for a total of 735). The King County Canvassing Board moved to count these ballots. However, before they could be counted, the Republican Party filed suit in Pierce County Superior Court, seeking to block King County elections officials from including the newly discovered ballots in the hand recount. A Pierce County Superior Court judge sided with the Republicans and ordered King County elections officials to omit the newly discovered ballots from the hand recount. The Democratic Central Committee, which was allowed to intervene in the Pierce County suit, appealed that order to this court. We held that a county canvassing board has discretion to recanvass ballots in certain circumstances and thus reversed the superior court's order and allowed the newly discovered ballots to be canvassed and included in the total tally of votes. *See Wash. State Republican Party v. King County,* 153 Wn.2d 220, 224, 103 P.3d 725 (2004).

The hand recount was completed on December 23. With the newly discovered ballots included in the final tally, Gregoire received 1,373,361 votes, Rossi received 1,373,232 votes, and Bennett received 63,456 votes, giving Gregoire a 129-vote victory over Rossi. The secretary of state transmitted the election results to the legislature on December 30. The legislature certified Gregoire as the

winner on January 11, 2005, and she was sworn in as governor on January 12.

Following the certification of Gregoire as the winner of the election, seven electors, some of whom represented the Republican Party and the Rossi campaign, filed an election contest in Chelan County Superior Court. In it, the contestants claimed that hundreds of "illegal votes" – including votes cast by felons, and votes cast on behalf of deceased electors – made the difference in the election. *Borders* Oral Decision at 6. The contestants further alleged that "errors, omissions, mistakes, neglect and other wrongful acts" by county election officials affected the outcome of the election and necessitated its nullification. *Id.* The Democratic Central Committee intervened and defended the result of the election. After months of pretrial proceedings, including voluminous discovery, a two-week trial was held in Chelan County Superior Court in which dozens of fact witnesses, several expert witnesses, and hundreds of exhibits were presented. On June 6, the Chelan County Superior Court judge presiding over the case dismissed the contest. After weighing the evidence, he concluded that the contestants had failed to prove that grounds for nullification of the election existed. *See generally Borders* Oral Decision. Specifically, he ruled that, while the contestants had proved that errors and omissions by county election officials had occurred, and that illegal votes were cast, they had not proved that the outcome of the governor's election was changed as a result.

On June 7, Rossi and the Republicans decided not to appeal that ruling. Several weeks after the *Borders* case was dismissed, the $730,000 deposited by the Democratic Party when it requested a second recount was returned to

the party together with two percent interest on the $730,000.

The election contests of Stevens, Coday, Karr, and Goodall were filed directly in this court on January 3, 5, 10, and 19, respectively. The secretary of state and the Democratic Central Committee, though not named parties in these contests, requested the opportunity to comment on how they should be addressed. We granted these requests and received comments from both parties on July 12. In their comments, the secretary of state and the Democratic Central Committee both argued that these contests either failed to state a cognizable claim under the election contest statute or were identical to the *Borders* claim and, therefore, barred by res judicata. Both the secretary of state and the Democratic Central Committee urged this court to dismiss all four contests.

II. Summary of Contests

A. Coday Contest, No. 76480-8

Arthur Coday, Jr., a registered voter in King County, argues that the state violated the Washington Constitution in conducting the 2004 gubernatorial election. Specifically, he contends that article I, section 19 of the Washington Constitution was violated. Article I, section 19, entitled "Freedom of Elections" provides that "[a]ll Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." He claims that the State ran afoul of this provision in five particular ways.

Coday first argues that article I, section 19 was violated because Gregoire and the Democratic Party were allowed to "purchase the right to a hand recount." Coday

Br. at 5 ("the Democratic . . . Party made payment of money to the State in order to purchase the right to recount a State-certified election"). The election was literally not "free" as required by article I, section 19, Coday argues, because the recount, and therefore the election, could be "bought or sold." *Id.*

Coday next argues that the election was not "equal" because all voters did not have the "unconditional right to call for a recount." *Id.* at 7. He asserts that the opportunity to call for a recount must be unconditional, i.e., unlimited. Because effectively only one party may call for a recount under Washington's recount statute, the opportunity for other parties to seek a recount is necessarily limited. Furthermore, Coday argues, the person who actually does get to request a recount is afforded a "special favor." *Id.*

Coday's third argument is that the State improperly counted additional ballots not tabulated in the initial count. He observes that "in the three counts of ballots in the election process for the Governor, there has been one count each of three different sets of ballots, and not a single 'recount' of the original set of approved ballots." *Id.* According to Coday, the failure to count only one set of ballots "violates the principle of 'equal [sic].'" *Id.* at 8.

Next, Coday claims that "Washington's recount laws are statistically flawed." *Id.* at 10. He argues that the proper statistical method for determining the winner of an election during a recount is to average the results of each of the counts. Because Washington's recount method considers only the results of the final count, it is contrary to "[m]odern statistical theory." *Id.*

Coday's final argument is focused on the practice of enhancing ballots. He asserts that the practice of enhancing

ballots is inherently illegal, claiming that "[a]n 'enhanced' ballot is merely a pseudonym for a ballot tainted by tampering." *Id.* at 11.

Coday asks this court to require the State to return the money provided to it by the Democratic Party in advance of the recount. He also asks us to "[s]trike down any law that provides private parties with the unconditional right to call for a recount," require the use of a single set of ballots for each of the recounts, require the State to average the results of each of the recounts, reject all enhanced ballots, and inaugurate Dino Rossi as governor of Washington. *Id.* at 12.

B. Goodall Contest, No. 76541-3

Michael J. Goodall, a registered voter in King County, filed a "Citizens Complaint" contesting the election of Christine Gregoire as governor. He alleges that Gregoire is unfit to be governor because she impermissibly offered Washington voters a reward in exchange for their votes.

Goodall's son, C.N., has severe autism and was placed in foster care because neither Goodall nor C.N.'s mother could properly care for him. Goodall argues that while in foster care, his son was abused and maltreated. He contends that then-Attorney General Gregoire was aware of this abuse but conspired with other individuals in the Office of the Attorney General and with other state agencies and the King County Superior Court to cover up this abuse in order to shield the State from a large judgment. Goodall maintains that Gregoire was motivated to prevent a large judgment against the State because it would be politically embarrassing for the Office of the Attorney

General and would hurt her chances of being elected governor.

Goodall contends this alleged "cover-up" falls within RCW 29A.68.020(4) and is a basis for invalidating the results of the election. RCW 29A.68.020(4) provides that any registered voter may contest the right of

> any person declared elected to an office to be issued a certificate of election . . .
>
> . . . .
>
> (4) Because the person whose right is being contested gave a bribe or reward to a voter or to an inspector or judge of election for the purpose of procuring the election, or offered to do so.

Goodall asks this court to "not allow Christine Gregoire to become Governor" because her alleged deliberate acts of "covering up [acts of child] abuse and maltreatment" by state foster homes violated RCW 29A.68.030(4). Citizens Complaint at 7.

C. Karr Contest, No. 76500-6

Suzanne D. Karr, a registered voter in Snohornish County, filed an "Affidavit of Error or Omission" in which she contests the results of the 2004 gubernatorial election. Karr charges that the election is invalid because of misconduct on the part of King County election officials and illegal votes counted in the governor's race.

With respect to her claim of misconduct on the part of election officials, Karr claims that (1) a number of provisional ballots in King County were counted without having first been deemed valid, (2) election officials impermissibly

released to the Democratic and Republican parties names of provisional voters whose signatures on file did not match their signatures on their ballots and allowed the parties to submit signature verification affidavits on behalf of voters, and (3) election officials failed to obtain or to adequately verify voter signatures on some ballots, resulting in a greater number of votes being cast than voters appearing on the list of electors having voted.

Karr claims that a number of illegal votes were counted because some voters cast more than one vote or were disqualified under article VI, section 3 of the Washington Constitution,[2] because they were felons or had been declared incompetent. Karr contests the right of Gregoire to be elected but asks for no particular relief.

D. Stevens Contest, No. 76479-4

Daniel P. Stevens, a registered voter in King County, claims that the results of the election are invalid because "[t]he delta value of votes given to both candidates is exponentially within the tally's margin of error, to the point that error must be assumed as a certainty, as given by three separate counts resulting in three different outcomes." Stevens' Br. at 1.

Stevens requests that this court "[n]ullify the election" and "[o]rder a revote." *Id.*

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[2] Article VI, section 3 provides: "All persons convicted of infamous crime unless restored to their civil rights and all persons while they are judicially declared mentally incompetent are excluded from the elective franchise."

III.

Under the election contest statute, chapter 29A.68 RCW, an election may be contested based only on a limited number of causes, which are enumerated therein. *See* RCW 29A.68.011, .020; *Foulkes v. Hays,* 85 Wn.2d 629, 632-35, 537 P.2d 777 (1975). RCW 29A.68.020 provides that the causes on which an election may be contested are:

> (1) [Because of] misconduct on the part of any member of any precinct election board involved therein;
>
> (2) Because the person whose right is being contested was not at the time the person was declared elected eligible to that office;
>
> (3) Because the person whose right is being contested was previous to the election convicted of a felony by a court of competent jurisdiction, the conviction not having been reversed nor the person's civil rights restored after the conviction;
>
> (4) Because the person whose right is being contested gave a bribe or reward to a voter or to an inspector or judge of election for the purpose of procuring the election, or offered to do so;
>
> (5) On account of illegal votes.

An election may be challenged under causes enumerated in RCW 29A.68.011 as well. *See Foulkes,* 85 Wn.2d at 632-35. RCW 29A.68.011 provides in pertinent part:

> Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty and to do

> as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed, whenever it is made to appear to such justice or judge by affidavit of an elector that:
>
> . . . .
>
> (4) A wrongful act . . . has been performed or is about to be performed by any election officer; or
>
> (5) Any neglect of duty on the part of an election officer . . . has occurred or is about to occur; or
>
> (6) An error or omission has occurred or is about to occur in the issuance of a certificate of election.

In *Foulkes,* this court agreed that a challenger could maintain a challenge to an election under the equivalent to current RCW 29A.68.011 even if grounds to contest the election under the equivalent to current RCW 29A.68.020 did not exist. *Foulkes,* 85 Wn.2d at 632-35. Thus, where a challenger alleges that an election official has engaged in a wrongful act or has neglected a duty, he or she may challenge the results of the election under RCW 29A.68.011, even if none of the specific causes enumerated in RCW 29A.68.020 are implicated.

RCW 29A.68.030 provides that "[n]o statement of contest may be dismissed for want of form if the particular causes of contest are alleged with *sufficient certainty.*" (Emphasis added.) Thus, an election contest which fails to allege "the particular causes of contest . . . with sufficient certainty" may be dismissed. RCW 29A.68.030.

"Sufficient certainty" is not defined in the statute, nor have we had occasion to define that particular term. However, in previous election contest cases, this court has utilized generally applicable, liberal pleading rules. *See Dumas v. Gagner,* 137 Wn.2d 268, 282, 971 P.2d 17 (1999). In *Dumas,* a case involving a contested port commissioner election, the contestant failed to cite specific statutory election contest provisions in his election contest petition. Nevertheless, we allowed the contest to proceed. In so doing, we observed that

> [a]lthough Respondent's petition did not cite specific subsections of the [election contest] statute, *sufficient facts and law were stated concerning the nature of the claim to bring the petition under the statute.* Although the petition is not a model of pleading, it is nevertheless adequate so long as it is *sufficient to satisfy necessary legal requirements.*

Id. (emphasis added).

Although we did not indicate what the "necessary legal requirements" are in an election contest petition or affidavit, we referred to the standard articulated in *Lightner v. Balow,* 59 Wn.2d 856, 370 P.2d 982 (1962). In *Lightner,* this court recognized that "'"'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"' " *Lightner,* 59 Wn.2d at 858 (quoting *Sherwood v. Moxee Sch. Dist. No. 90,* 58 Wn.2d 351, 353, 363 P.2d 138 (1961) (quoting *Conley v. Gibson,* 355 U.S. 41, 45, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957))).

This standard is similar to that applicable to a motion to dismiss pursuant to Civil Rule (CR) 12(b)(6). Dismissal of a claim pursuant to CR 12(b)(6) is appropriate "only if 'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.'" *Orwick v. City of Seattle,* 103 Wn.2d 249, 254, 692 P.2d 793 (1984) (quoting *Corrigal v. Ball & Dodd Funeral Home, Inc.,* 89 Wn.2d 959, 961, 577 P.2d 580 (1978)).

Each of these four contests was timely filed. Furthermore, while none of the contests is a "model of pleading," *Dumas,* 137 Wn.2d at 282, we will not dismiss election contests "for want of form." RCW 29A.68.030. Thus, we must determine whether each of these contests states a claim under the election contest statute with "sufficient certainty." We will consider each contest seriatim.

A. Coday Contest

Coday's first two claims, that the election was not "free" as required by the constitution because Gregoire was allowed to "purchase the right to a hand recount" and that the election was not "equal" as required by the constitution because not all citizens had an equal, unqualified right to contest the election, are not cognizable under the election contest statute. The procedure for commencing a recount and the requirement that a deposit be made to cover the costs of a recount should the result of the election not be changed are established by statute. *See* RCW 29A.64.011, .030, .081. A party requesting a recount does not purchase the right to a recount, but makes a deposit, which is refunded if the result of the election is reversed as a result of the recount. *See* RCW 29A.64.030. Furthermore, any

elector, along with four other electors, has the right to request a recount. RCW 29A.64.011. Neither of the provisions Coday challenges violates the "free and equal" requirement of article I, section 19 of the constitution.

The third claim, that the State violated its own laws by counting different sets of ballots in each recount, is meritless in light of our decision in *Washington State Republican Party,* which addressed this very issue and approved the practice of counting certain ballots in a recount that had not been previously counted, under certain circumstances. *See Wash. State Republican Party,* 153 Wn.2d at 224. Coday's fourth issue, that the State's ballot counting procedures were statistically flawed, is not addressable under any provision of the election contest statute. The recounts were properly conducted pursuant to the methodology established in statute. The statute governing recounts, chapter 29A.64 RCW, neither provides for, nor allows, the statistical averaging of recount results. Nothing about this recount methodology violates article I, section 19's requirement of "free and equal" elections.

The fifth issue raised by Coday is similarly without merit. Coday claims that the practice of ballot enhancement violates the constitutional requirement of an "equal" election. The practice of ballot enhancement does not actually "enhance" a ballot, but instead allows a vote recorded on a ballot to be made readable by electronic voting equipment consistently with the voter's intent. WAC 434-261-005. The secretary of state has authorized the practice of ballot enhancement (*see* WAC 434-261-005, -070, -080, and -085), and has dictated procedures to ensure that ballot enhancement occurs in a fair and transparent manner. *See* WAC 434-261-070(3)(c), -080.

This process does not in any way run afoul of our constitution's requirement for an "equal" election.

B. Goodall Contest

Goodall bases his contest specifically on RCW 29A.68.020(4), claiming that Gregoire gave bribes or rewards to voters in exchange for their votes. While Goodall's allegations, if true, might give rise to *some* legal claim, they are not cognizable under the election contest statute. Actions taken to avoid large judgments against the state do not constitute a "bribe or reward to a voter" given "for the purpose of procuring the election." RCW 29A.68.020(4). Goodall's contest, therefore, fails to satisfy the necessary legal requirements.

C. Stevens Contest

The Stevens' contest is based on his assertion that "error must be assumed as a certainty" because "[t]he delta value of votes given to both candidates is exponentially within the tally's margin or error." Stevens' Br. at 1. While this assertion may well be true, it does not entitle him to any relief under chapter 29A.68 RCW. He fails to point to any wrongful act or neglect of duty on the part of any election official under RCW 29A.68.011. Furthermore, the fact that the number of votes separating the candidates was within the margin of error does not constitute "error" in the issuance of a certification of election of the type contemplated by the statute. Finally, Stevens' claims do not fall within any of the causes specified in RCW 29A.68.020. It therefore fails to satisfy necessary legal requirements.

D. Karr Contest

While want of form and arguably deficient in evidence, the Karr contest raises issues that are clearly addressable under RCW 29A.68.020. As noted above, she claims that there was misconduct on the part of election officials and that illegal votes were cast in favor of Gregoire. She supports these broad claims by referencing specific acts and omissions.

The first cause she puts forth, "misconduct on the part of election officers and members of the precinct election board involved [in the conduct of the election]," Karr Aff. at 1, states a claim under RCW 29A.68.020(1) (allowing a registered voter to contest an election based on "misconduct on the part of any member of any precinct election board involved [in conduct of the election]"). Her second cause, illegal votes, falls squarely within RCW 29A.68.020(5), which allows a voter to contest an election based on "illegal votes."

Karr's contest is "sufficient to satisfy necessary legal requirements" in that, assuming the allegations raised in her affidavit are true, she would likely be entitled to relief. *Dumas,* 137 Wn.2d at 282 Karr therefore presents a cognizable claim under chapter 29A.68 RCW.

IV.

While the Karr contest is sufficient to state a claim under chapter 29A.68 RCW, because it is identical to the *Borders v. King County* contest,[3] it is barred by the doctrine

[3] Under ER 201, Washington courts generally do not take judicial notice of court records from a different case. However, this court has

(Continued on following page)

of res judicata. Under that doctrine, a prior judgment will bar litigation of a subsequent claim if the prior judgment has "a concurrence of identity with [the] subsequent action in (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the quality of the persons for or against whom the claim is made." *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

Karr's contest is identical in subject matter (errors, omissions, and misconduct committed by elections officials in the conduct of the 2004 gubernatorial election and illegal votes cast by individuals constitutionally disqualified from voting) and cause of action (an election contest under chapter 29A.68 RCW). Furthermore, Karr is identical to the parties in the *Borders* case. Generally, the rules

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held that "where the state of the pleadings is such that the plea of *res judicata* cannot be interposed, and there is no opportunity to raise the point on the introduction of evidence, the court will take judicial notice of the prior decision adjudicating the issue." *Reagh v. Hamilton*, 194 Wash. 449, 455, 78 P.2d 555 (1938) (citing *Wilkes v. Davies*, 8 Wash. 112, 121, 35 P. 611 (1894) ("It is true that the plea of *res adjudicata* was not presented by the pleadings, nor was it offered in proof under the general issue, which are the two ordinary ways of bringing this question to the notice of the court. But this case falls within the rule laid down by many courts where no opportunity to plead the former adjudication is presented.")). In this case, the petitioner, Karr, did not name opposing parties and therefore there was no party to plead and prove res judicata as a defense, although the secretary of state and the Democratic Central Committee both argued in comments submitted to this court that res judicata should bar Karr's claims. Furthermore, Karr herself urged this court to "utilize the evidence from the *Borders* case as a foundation for ruling on this affidavit." Resp. by Pet'r to Comments Filed by the Sec'y of State and the Democrat Cent. Comm. at 5. She offered that she "does not have the legal resources or any desire to waste this Court's time by reintroducing relevant evidence and testimony already covered in the *Borders* case." *Id.* Under these unusual circumstances, we find it appropriate to take judicial notice of the oral decision in *Borders*.

that allow for concurrence of identity between parties are quite strict. However, where "nominally different parties" pursue causes of action as voters, on behalf of the body politic generally, such parties have been found to "have sufficiently identical interests to satisfy the 'identity of parties' inquiry" because they possess "the same legal interests as all citizens of the state." *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 261, 961 P.2d 343 (1998); *accord Snyder v. Munro*, 106 Wn.2d 380, 384, 721 P.2d 962 (1986) (holding that "all citizens of Washington state were well represented in" a prior suit brought by the leaders of the state Democratic and Republican organizations and state government officials, and that therefore res judicata barred registered voters from raising the same claim in a subsequent action).

While Karr was not a participant in the *Borders* case, she is acting in the same capacity, and has the same legal interest, as the participants in that case. Like the contestants in the *Borders* case, Karr is an elector, pursing an election contest qua elector pursuant to chapter 29A.68 RCW. Furthermore, her interest is identical to that of the *Borders* contestants and of all citizens of the state: ensuring a fair, just, and accurate election. She is, therefore, an identical party to the *Borders* contestants for res judicata purposes. Because there is a concurrence of identity between Karr's contest and the *Borders* contest, her contest is barred by res judicata.[4]

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[4] We are reluctant to bar citizens from exercising the right, afforded them by statute, to contest an election. However, we are also wary of numerous election contests being conducted in multiple jurisdictions, which could result in conflicting verdicts, ongoing uncertainty in the outcome of elections, and the needless expenditure of

(Continued on following page)

V. Conclusion

The parties in the contests of Coday, Goodall, Karr, and Stevens have not raised the issue of this court's jurisdiction to decide an election contest for governor. Article III, section 4, of the Washington Constitution says that election contests for statewide executives, including the governor, "shall be decided by the legislature in such manner as shall be determined by law." We have assumed, without deciding, that chapter 29A.68 RCW confers jurisdiction on this court to decide the present election contests. We reserve the right to consider the question of whether the constitution gives the legislature exclusive jurisdiction over governor's election contests if it is properly raised at some future time.

In conclusion, the contests of Coday, Goodall, and Stevens do not state a cognizable claim under the election contest statute, chapter 29A.68 RCW. Karr's contest is identical to the *Borders* contest and is, therefore, barred by res judicata. We, therefore, dismiss all four contests.

/s/ Alexander, C.J.

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judicial resources. Thus, in cases such as this one, where parties to one election contest adequately represent the electorate (i.e., have significant stake in the outcome of the contest and invest significant resources in pursuing all viable grounds for the contest) we will invoke the doctrine of res judicata to bar substantially identical contests. However, we might well decline to apply res judicata to bar election contests where the contestants in an earlier case do not adequately represent the interests of the electorate generally.

WE CONCUR:

/s/ [Illegible]	/s/ [Illegible]
/s/ [Illegible]	/s/ [Illegible]
/s/	/s/ [Illegible]
/s/ [Illegible]	/s/

SANDERS, J. (dissenting) – The majority denies Suzanne D. Karr her day in court to litigate an election contest asserting it is barred by res judicata. I strongly disagree. The mere fact that Ms. Karr and the unrelated litigants in the unappealed trial court proceeding of *Borders v. King County*[1] sought to contest the same election does not constitute a concurrence of cause of action or of persons or parties for the purposes of the doctrine. This ruling strikes at the heart of the fundamental right of every person to access the courts. I dissent.

I. ANALYSIS

Under well-established precedent, res judicata bars a subsequent action only if a prior judgment has concurrence of identity in "(1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made" with the subsequent action. *Rains v. State,* 100 Wn.2d 660, 663, 674 P.2d 165 (1983). Where the issues or the parties are not the same, the doctrine simply does not apply. *Snyder v. Munro,* 106 Wn.2d 380, 383, 721 P.2d 962 (1986) (citing *Int'l Bhd.*

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[1] *Borders v. King County,* No. 05-2-00027-3 (Chelan County Super. Ct. June 24, 2005).

of Pulp, Sulphite & Paper Mill Workers v. Delaney, 73 Wn.2d 956, 960, 442 P.2d 250 (1968)). As we have explained:

> "Privity does not arise from the mere fact that persons as litigants are interested in the same question or in proving or disproving the same state of facts. Privity within the meaning of the doctrine of res judicata is privity as it exists in relation to the subject matter of the litigation, and the rule is construed strictly to mean parties claiming under the same title. It denotes mutual or successive relationship to the same right or property."

Owens v. Kuro, 56 Wn.2d 564, 568, 354 P.2d 696 (1960) (quoting *Sodak Distrib. Co. v. Wayne,* 77 S.D. 496, 502, 93 N.W.2d 791, 795 (1958)).

Holding Ms. Karr and the litigants in *Borders* are identical parties for res judicata purposes, the majority purports to rely on *Snyder* and *In re Recall of Pearsall-Stipek,* 136 Wn.2d 255, 961 P.2d 343 (1998). Majority at 817. Not so.

The plaintiffs in *Snyder* identified themselves as "members of a 'political party or group'" discriminated against by the legislative redistricting at issue in that case. *Snyder,* 106 Wn.2d at 384. We found sufficient privity with parties in the prior judgment existed because "[t]he parties in the prior judgment were the acknowledged heads of the major political parties in Washington." *Id.* However no such relationship exists between Ms. Karr and the *Borders* litigants. Ms. Karr did not participate in the Wenatchee trial. The record is silent on her political affiliation, if any. Her affidavit of error or omission was filed on January 10, 2005, a mere three days after the

Borders contest was filed and some five months before the ruling in that case. In short, nothing in the record suggests a "'mutual or successive relationship'" between Ms. Karr and the parties in *Borders*. *Owens*, 56 Wn.2d at 568 (quoting *Wayne*, 77 S.D. at 502).

Pearsall-Stipek is similarly inapposite[2] because, unlike the petitioner in that case, Ms. Karr has not confined her affidavit to merely "present[ing] the same charges based on the same facts." *Pearsall-Stipek*, 136 Wn.2d at 259. Furthermore, whereas the initial litigation in *Pearsall-Stipek* had exhausted all available appeals, the petitioners in *Borders* elected not to appeal an adverse ruling on several key legal issues. Absent some proven close connection between Ms. Karr and the contestants in *Borders*, the fact Ms. Karr is challenging the result of the same election, standing alone, is insufficient to establish the concurrence of the parties' identity. *See Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 768, 887 P.2d 898 (1995) (holding "[p]rivity is established in cases where the person exercises actual control or substantially participates in the litigation").

The majority also holds Ms. Karr's and the *Borders*' election contests arise under the same cause of action. Majority at 17. I disagree. Ms. Karr has stated a claim under both RCW 29A.68.020(1), alleging "misconduct on the part of any member of any precinct election board involved [in the election]," and RCW 29A.68.020(5), alleging Governor Gregoire was issued a certificate of

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[2] I found *Pearsall-Stipek*'s dicta on res judicata unconvincing as explained in my concurrence, a concurrence ironically joined by Chief Justice Alexander.

election "[o]n account of illegal votes."[3] By contrast, the *Borders* petitioners alleged violations of RCW 29A.68.020(5) and RCW 29A.68.011(4) and (5), but not RCW 29A.68.020(1). *See* Court's Oral Decision, Verbatim Report of Proceedings at 6 (*Borders v. King County,* No. 05-2-00027-3 (Chelan County Super. Ct. June 6, 2005)). By concluding the two contests arise under an identical cause of action, majority at 17, the majority effectively merges RCW 29A.68.011(4), (5), and RCW 29A.68.020(1), impermissibly rendering the latter superfluous. *See Davis v. Dep't of Licensing,* 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous). Therefore, Ms. Karr's claim of "misconduct on the part of election officers and members of the precinct election board involved [in the election]"[4] under RCW 29A.68.020(1) cannot be barred by the doctrine of res judicata for the additional reason it was not raised by the petitioners in *Borders.*

The majority concludes its analysis by cautioning this court will invoke res judicata to bar future election contests if "parties to one election contest adequately represent the electorate." Majority at 817 n.4. Put differently, the majority effectively conditions the citizens' right to contest an election on our assessment of the efficacy of any previous contests. This novel approach represents a stark departure from the well-settled principle that res judicata bars a subsequent claim if and only if congruence of "(1) subject matter; (2) cause of action; (3) persons and parties;

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[3] Suzanne D. Karr Affidavit of Error or Omission at 1, 3; *see also* majority at 15-16.

[4] Suzanne D. Karr Affidavit of Error or Omission at 1.

and (4) the quality of the persons for or against whom the claim is made" exists, *Rains*, 100 Wn.2d at 663, and threatens to undermine the doctrine in nonelection cases as well. Perhaps this language is sugar coating a poison pill – because I see no principled distinction between application of this newly invented doctrine to election contests and any other case.

While it is true in the abstract that a party with a "significant stake in the outcome"[5] of an election contest who "invest[s] significant resources in pursuing all viable grounds"[6] may also share the four concurrences of identity discussed above with a subsequent petitioner, it is not automatic and has not been demonstrated in this case. The concerns regarding conflicting verdicts in multiple jurisdictions, uncertainty regarding outcomes, and inefficient use of judicial resources raised by the majority in support of its approach are by no means unique to election contests and do not justify diluting the strict requirements of a doctrine, which can, if misapplied, strike at the heart of a person's right to access the judiciary.

Moreover the *Borders* petitioners waived their right to appeal, hardly evidencing vigorous pursuit of "all viable grounds." Had they done so we would likely have a published precedent from this state's highest court which would either support or undermine Ms. Karr's claims – a disincentive for further litigation on her part or anyone else's, probably also avoiding some of the practical objections the majority posits.

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[5] Majority at 18 n.4.

[6] *Id.*

II. CONCLUSION

Ms. Karr has the statutory right to contest this election in court. This election contest is not barred by the doctrine of res judicata because she is not in privity with the parties in the *Borders* contest and has invoked a distinct statutory cause of action in her affidavit.

I dissent.

/s/ [Illegible]

/s/ [Illegible]

THE SUPREME COURT OF WASHINGTON

In the Matter of the Election Contest Filed by ARTHUR CODAY, JR., SUZANNE D. KARR, Petitioner.	NO. 76480-8 NO. 76500-6 **ORDER DENYING MOTIONS FOR RECONSIDERATION** (Filed May 31, 2006)

The Court having considered each of the Motions for Reconsideration filed by Arthur Coday, Jr. and Suzanne D. Karr;

Now, therefore, it is hereby

ORDERED:

That both Motions for Reconsideration are denied.

DATED at Olympia, Washington this 31st day of May, 2006.

For the Court

/s/ [Illegible]
CHIEF JUSTICE

156 Wn.2d 485

RCW 29A.64.011
Application – Requirements – Application of chapter.

An officer of a political party or any person for whom votes were cast in a primary who was not declared nominated may file a written application for a recount of the votes or a portion of the votes cast at that primary for all persons for whom votes were cast for nomination to that office.

An officer of a political party or any person for whom votes were cast at any election may file a written application for a recount of the votes or a portion of the votes cast at that election for all candidates for election to that office.

Any group of five or more registered voters may file a written application for a recount of the votes or a portion of the votes cast upon any question or issue. They shall designate one of the members of the group as chair and shall indicate the voting residence of each member of the group.

An application for a recount of the votes cast for an office or on a ballot measure must be filed with the officer with whom filings are made for the jurisdiction.

An application for a recount must specify whether the recount will be done manually or by the vote tally system. A recount done by the vote tally system must use programming that recounts and reports only the office or ballot measure in question. The county shall also provide for a test of the logic and accuracy of that program.

An application for a recount must be filed within three business days after the county canvassing board or secretary of state has declared the official results of the primary

or election for the office or issue for which the recount is requested.

This chapter applies to the recounting of votes cast by paper ballots and to the recounting of votes recorded on ballots counted by a vote tally system.

[2004 c 271 § 177.]

RCW 29A.64.021
Mandatory.

(1) If the official canvass of all of the returns for any office at any primary or election reveals that the difference in the number of votes cast for a candidate apparently nominated or elected to any office and the number of votes cast for the closest apparently defeated opponent is less than two thousand votes and also less than one-half of one percent of the total number of votes cast for both candidates, the county canvassing board shall conduct a recount of all votes cast on that position.

(a) Whenever such a difference occurs in the number of votes cast for candidates for a position the declaration of candidacy for which was filed with the secretary of state, the secretary of state shall, within three business days of the day that the returns of the primary or election are first certified by the canvassing boards of those counties, direct those boards to recount all votes cast on the position.

(b) If the difference in the number of votes cast for the apparent winner and the closest apparently defeated opponent is less than one hundred fifty votes and also less than one-fourth of one percent of the total number of votes

cast for both candidates, the votes shall be recounted manually or as provided in subsection (3) of this section.

(2) A mandatory recount shall be conducted in the manner provided by RCW 29A.64.030, 29A.64.041, and 29A.64.061. No cost of a mandatory recount may be charged to any candidate.

(3) The apparent winner and closest apparently defeated opponent for an office for which a manual recount is required under subsection (1)(b) of this section may select an alternative method of conducting the recount. To select such an alternative, the two candidates shall agree to the alternative in a signed, written statement filed with the election official for the office. The recount shall be conducted using the alternative method if: It is suited to the balloting system that was used for casting the votes for the office; it involves the use of a vote tallying system that is approved for use in this state by the secretary of state; and the vote tallying system is readily available in each county required to conduct the recount. If more than one balloting system was used in casting votes for the office, an alternative to a manual recount may be selected for each system.

[2004 c 271 § 178.]

RCW 29A.64.030
Deposit of fees – Notice – Public proceeding.

An application for a recount shall state the office for which a recount is requested and whether the request is for all or only a portion of the votes cast in that jurisdiction of that office. The person filing an application for a manual recount shall, at the same time, deposit with the

county canvassing board or secretary of state, in cash or by certified check, a sum equal to twenty-five cents for each ballot cast in the jurisdiction or portion of the jurisdiction for which the recount is requested as security for the payment of any costs of conducting the recount. If the application is for a machine recount, the deposit must be equal to fifteen cents for each ballot. These charges shall be determined by the county canvassing board or boards under *RCW 29A.64.080.

The county canvassing board shall determine a time and a place or places at which the recount will be conducted. This time shall be less than three business days after the day upon which: The application was filed with the board; the request for a recount or directive ordering a recount was received by the board from the secretary of state; or the returns are certified which indicate that a recount is required under *RCW 29A.64.020 for an issue or office voted upon only within the county. Not less than two days before the date of the recount, the county auditor shall mail a notice of the time and place of the recount to the applicant or affected parties and, if the recount involves an office, to any person for whom votes were cast for that office. The county auditor shall also notify the affected parties by either telephone, fax, e-mail, or other electronic means at the time of mailing. At least three attempts must be made over a two-day period to notify the affected parties or until the affected parties have received the notification. Each attempt to notify affected parties must request a return response indicating that the notice has been received. Each person entitled to receive notice of the recount may attend, witness the recount, and be accompanied by counsel.

Proceedings of the canvassing board are public under chapter 42.30 RCW. Subject to reasonable and equitable guidelines adopted by the canvassing board, all interested persons may attend and witness a recount.

[2003 c 111 § 1603. Prior: 2001 c 225 § 5; 1991 c 81 § 36; 1987 c 54 § 5; 1977 ex.s. c 361 § 99; 1965 c 9 § 29.64.020; prior: 1961 c 50 § 2; 1955 c 215 § 2. Formerly RCW 29.64.020.]

NOTES:

***Reviser's note:** RCW 29A.64.080 and 29A.64.020 were repealed by 2004 c 271 § 193. Later enactment, see RCW 29A.64.081 and 29A.64.021.

Effective date – 1991 c 81: See note following RCW 29A.84.540.

Effective date – Severability – 1977 ex.s. c 361: See notes following RCW 29A.16.040.

RCW 29A.64.070
Limitation.

After the original count, canvass, and certification of results, the votes cast in any single precinct may not be recounted and the results recertified more than twice.

[2003 c 111 § 1607. Prior: 2001 c 225 § 9; 1991 c 90 § 3. Formerly RCW 29.64.051.]

NOTES:

Finding, purpose – 1991 c 90: "The legislature finds that it is in the public interest to determine the winner of close contests for elective officers as expeditiously and as accurately as possible. It is the purpose of this act to provide procedures which promote the prompt and accurate recounting of votes for elective offices and which provide closure to the recount process." [1991 c 90 § 1.]

RCW 29.A.64.081
Expenses – Charges.

The canvassing board shall determine the expenses for conducting a recount of votes.

The cost of the recount shall be deducted from the amount deposited by the applicant for the recount at the time of filing the request for the recount, and the balance shall be returned to the applicant. If the costs of the recount exceed the deposit, the applicant shall pay the difference. No charges may be deducted by the canvassing board from the deposit for a recount if the recount changes the result of the nomination or election for which the recount was ordered.

[2004 c 271 § 181.]

RCW 29A.64.090
Statewide measures – When mandatory – Cost at state expense.

When the official canvass of returns of any election reveals that the difference in the number of votes cast for the approval of a statewide measure and the number of

votes cast for the rejection of such measure is less than two thousand votes and also less than one-half of one percent of the total number of votes cast on such measure, the secretary of state shall direct that a recount of all votes cast on such measure be made on such measure, in the manner provided by *RCW 29A.64.060, and the cost of such recount will be at state expense.

[2003 c 111 § 1609. Prior: 2001 c 225 § 11; 1973 c 82 § 1. Formerly RCW 29.64.080.]

NOTES:

***Reviser's note:** RCW 29A.64.040 and 29A.64.060 were repealed by 2004 c 271 § 193. Later enactment, see RCW 29A.64.041 and 29A.64.061.

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28 U.S.C. Section 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.